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No. 91-991

In the Supreme Court of the United States

OCTOBER TERM, 1991

ALLEN GRIFFEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sentencing Guidelines apply to a conspiracy in which the conspirators committed overt acts in furtherance of the profitmaking objectives of the conspiracy after the effective date of the Guidelines.

2. Whether the Sentencing Guidelines apply to petitioner even though his active participation in the conspiracy ended prior to the effective date of the Guidelines.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. A3-A25, is reported at 943 F.2d 428.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1991. A petition for rehearing was denied on September 19, 1991. Pet. App. A1-A2. The petition for a writ of certiorari was filed on December 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to defraud and make false statements to the Department of Housing and Urban Development (HUD) and the Federal Housing Administration (FHA), in violation of 18 U.S.C. 371, and of making false statements to those agencies, in violation of 18 U.S.C. 1001.[1] He was sentenced to 14 months in prison, to be followed by two years of supervised release, and a $7,000 fine.

1. a. Petitioner was a real estate agent at the Carlton condominium complex in Arlington, Virginia. He conspired with two investors, Adolph J. Barsanti and Harold M. Kline,[2] and others in the following fraudulent scheme: To obtain favorable owner-occupier HUD-insured mortgages for condominiums,[3] certain real estate agents at the Carlton, including petitioner, assisted Barsanti and Kline in finding "straw purchasers" who were willing to act as condominium purchasers but did not intend to occupy the units. Barsanti and Kline would later acquire the ostensible buyers' interests and rent the units to

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[1] Petitioner was charged with one count of conspiracy and six counts of making false statements. The government moved to dismiss three of the substantive counts before trial, and the jury acquitted petitioner on two of the remaining substantive counts. Gov't C.A. Br. 4 & n.2.

[2] Barsanti and Kline were each convicted of conspiracy and three counts of making false statements. Gov't C.A. Br. 4 n.2.

[3] Under pertinent HUD regulations, an owner-occupier of a single-family condominium was able to obtain a HUD-insured mortgage covering up to 97% of the value of the property, whereas a non-occupant investor's mortgage could not exceed 85% of the property's value. 24 C.F.R. 234.27 (1985).

other individuals through their partnership, BK Associates. Pet. App. A5-A6; Gov't C.A. Br. 5.

Five of the six transactions involved individuals who had considered purchasing units in the Carlton but decided against doing so. After the putative buyer decided against purchasing a unit, petitioner or another Carlton real estate agent would tell the individual that he or she could earn money by entering into a shared-equity arrangement with Barsanti or Kline. The would-be buyer and either Barsanti or Kline would jointly apply to HUD for an owner-occupier mortgage. To obtain the mortgage, both the "straw purchaser" and either Barsanti or Kline would sign a HUD form certifying that one of them was to occupy the unit. After loan approval, Barsanti or Kline would purchase the other party's interest, usually for $1500. Pet. App. A5-A6. Petitioner earned $1200 in commissions for two of the units sold in that manner. Presentence Report (PSR) ¶ 39.

In the sixth transaction, a couple (the Ohris) entered a purchase agreement for a unit at the Carlton. When the Ohris subsequently decided that they did not want to complete the transaction, petitioner placed them into contact with Barsanti, who agreed to purchase the condominium from them. The Ohris applied for a HUD-insured mortgage and certified that they would occupy it. They transferred their interest to Barsanti without ever occupying the unit as represented. Gov't C.A. Br. 15-16. For that deal, petitioner received an $800 commission. PSR ¶ 39.

b. The indictment alleged a conspiracy beginning in approximately April 1984 and continuing until December 13, 1989, the date of the indictment. All of the purchases and false certifications to HUD occurred in 1984 and 1985. The indictment charged that the objectives of the conspiracy included: (a) enriching petitioner and his co-conspirators and the

business entities with which they were affiliated by fraudulently obtaining HUD-insured loans; (b) preventing HUD and the FHA from learning that the units were not owner-occupied; (c) generating profits for Barsanti and Kline through their ownership and rental of the units continuously from the date of acquisition to the date of the indictment; and (d) providing Barsanti and Kline with the benefits of the favorable HUD-insured mortgages during that period. Indictment 7-8. The indictment charged as overt acts not only the actions taken in connection with the acquisition of the units in 1984 and 1985, *id.* at 12-30, but also the continuous ownership of the units, the receipt of rental payments, and the payment of installments on the HUD-insured mortgages. *Id.* at 30-32. The indictment further alleged that the co-conspirators, including petitioner, warned the "straw purchasers" not to reveal the circumstances surrounding the acquisitions of the units. *Id.* at 21 (¶ 43), 24 (¶ 66), 27 (¶ 80), 30 (¶¶ 96, 98).

2. At sentencing, petitioner and his co-defendants argued that the Sentencing Guidelines, which took effect on November 1, 1987, should not be applied to the conspiracy count because the conspiracy ended in 1985, when the last of the six HUD-insured mortgages was acquired.[4] The district court, however, held that "the retention of the units under their insured mortgage status, the making of mortgage payments, receipt of rents from others, that is others than those who signed up as ostensible occupants, all are acts in furtherance of the conspiracy." Pet. App. A7-A8.

3. The court of appeals affirmed. Pet. App. A3-A25. The court noted that the Sentencing Guidelines apply to conspiracies that started before but continued after

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[4] The district court did not apply the Sentencing Guidelines to the substantive counts. Gov't C.A. Br. 45 n.30.

the November 1, 1987, effective date of the Guidelines. *Id.* at A14-A15. The court concluded that the district court did not commit clear error, 18 U.S.C. 3742(e), in finding that the conspiracy extended beyond November 1, 1987. In so holding, the court of appeals observed that petitioner had made a proposal to Barsanti and Kline in which he projected a 40% return on condominiums that they held for three years. Because the units were purchased in 1984 and 1985, the court concluded that the conspiratorial agreement contemplated a conspiracy continuing beyond November 1, 1987.[5] The court also determined that, after the effective date of the Guidelines, Barsanti and Kline continued to engage in concerted activity to accomplish the objectives of the conspiracy. Through their partnership, Barsanti and Kline made mortgage payments, collected rents, and managed the properties after that date. Pet. App. A13-A19.

The court of appeals further held that the district court properly applied the Guidelines to petitioner. "Although his active conduct in the conspiracy had ceased before the effective date of the Guidelines," the court noted, "the conspiracy itself continued after that date." Pet. App. A19. Because petitioner had offered "no evidence that he acted to defeat or disavow the purposes of the conspiracy" before November 1, 1987, the court found that he remained a member of the conspiracy after the effective date of the Guidelines. *Ibid.*

ARGUMENT

1. Petitioner contends that the Sentencing Guidelines were not applicable to the conspiracy because it terminated when the final mortgage commitments

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[5] The evidence at trial showed a significant appreciation in the value of the units. Pet. App. A15.

were fraudulently secured in 1985—before the effective date of the Guidelines. Pet. 13-32.[6] This Court has held that a conspiracy requiring proof of an overt act continues after a particular date if one of the conspirators commits an overt act in furtherance of the conspiracy after that date. *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957). For purposes of that inquiry, "the scope of the conspiratorial agreement * * * determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Id.* at 397.

The courts of appeals have consistently held that when one of the objectives of a conspiracy is to secure a payoff or profit for a conspirator, acts calculated to bring about the anticipated result are in furtherance of the conspiracy.[7] As the court of appeals determined

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[6] Petitioner acknowledges, Pet. 17, that the courts of appeals have uniformly applied the Guidelines to conspiracies that continue past the effective date of the Guidelines. See, *e.g.*, *United States* v. *Arboleda*, 929 F.2d 858, 871 (1st Cir. 1991); *United States* v. *Meitinger*, 901 F.2d 27, 28 (4th Cir.), cert. denied, 111 S. Ct. 519 (1990); *United States* v. *Story*, 891 F.2d 988, 991-996 (2d Cir. 1989); *United States* v. *White*, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989).

[7] See, *e.g.*, *United States* v. *Fletcher*, 928 F.2d 495, 500 (2d Cir.) (because "the conspiracy contemplated a division of profits among the co-conspirators," the execution of a note to secure a co-conspirator his share of the profits "furthered one of its chief goals"), cert. denied, 112 S. Ct. 67 (1991); *United States* v. *Fitzpatrick*, 892 F.2d 162, 167-168 (1st Cir. 1989) (final bribery payoffs are overt acts in furtherance of conspiracy); *United States* v. *Mennutti*, 679 F.2d 1032, 1035 (2d Cir. 1982) (although the main conspiratorial objective of insurance fraud had been achieved, paying off a co-conspirator by selling him property at a low price was within the scope of the conspiracy); *United States* v. *Walker*, 653 F.2d 1343, 1346-1347 (9th Cir. 1981) (the last overt act in a bid-rigging

here, one object of the conspiracy in which petitioner participated was to earn Barsanti and Kline a profit through their holding of the unlawfully acquired condominiums during a period in which the units were expected to appreciate in value. Petitioner told Barsanti and Kline that if they held the units for three years, they could earn a 40% return on each unit; thus, the conspiratorial agreement contemplated holding the units acquired in 1985 until 1988.[8] After November 1, 1987, moreover, Barsanti and Kline, through their partnership, BK Associates, committed numerous overt acts in furtherance of the conspiracy's profitmaking objective—including the maintenance of their ownership interest through the collection of rents, payment of mortgage installments, and management of the unlawfully acquired properties.[9] Pet. App. A15-A19. The court of appeals

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conspiracy was not filing the false certifications of no bid rigging, but was reselling the illegally acquired property and dividing the excess profits among the co-conspirators), cert. denied, 455 U.S. 908 (1982).

[8] Petitioner contends that the conspiracy might in theory have lasted up to 30 years if Barsanti and Kline had not sold the units at any point during the term of the HUD-insured loans. Pet. 31-32. Contrary to his suggestion, Pet. 31, the mere possibility that co-conspirators may act to achieve their conspiratorial objectives over a lengthy period of time does not extend the statute of limitations.

[9] Petitioner argues that "[w]hile it was implicit [in the conspiracy] that someday the property would be sold and in the interim, the property would be rented, managed and otherwise lawfully maintained, these acts were not the objective of the fraudulent conduct and false statements." Pet. 23. That argument is beside the point; the management of the unlawfully acquired properties furthered the conspiratorial objective of earning and dividing the profits from the ultimate sale of the favorably financed HUD-insured properties. Petitioner is also unjustified in ascribing, Pet. 29, significance to the fact that

therefore properly held that overt acts in furtherance of the conspiracy were committed after the effective date of the Guidelines.[10]

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managing the properties was itself lawful; otherwise lawful acts may be overt acts in furtherance of an unlawful conspiracy. See, *e.g.*, *Fletcher*, 928 F.2d at 500 (execution of promissory note to pay co-conspirator's share of profits); *Fitzpatrick*, 892 F.2d at 168 (payment for remodeling work done as payoff for a bribe); *Walker*, 653 F.2d at 1347 (reselling timber acquired through bid rigging). Petitioner also errs in asserting, Pet. 23-24, 29-31, that the management of the units should not be treated as being in furtherance of the conspiracy because Barsanti and Kline in fact benefited the government by servicing the HUD-insured loans. The government, however, was harmed on a continuing basis by the conspiracy because the retention of units under falsely obtained HUD-insured mortgages diverted HUD's resources from qualifying projects.

[10] Petitioner errs in relying, Pet. 21-24, on *Grunewald* v. *United States*, 353 U.S. 391 (1957), in which this Court held that concealment of a conspiracy whose objectives have otherwise been accomplished does not extend the duration of the conspiracy. *Id.* at 399-405; accord *Fiswick* v. *United States*, 329 U.S. 211, 217 (1946) (conspiracy to falsify alien registration forms was not extended by concealment). Here, the court of appeals did not rely on concealment of the conspiracy in upholding the district court's application of the Guidelines. Rather, the court relied on the fact that Barsanti and Kline, by managing the properties, committed overt acts in furtherance of the profitmaking objectives of the conspiracy after the effective date of the Guidelines.

Petitioner also errs in asserting, Pet. 24-29, that the decision below is inconsistent with *United States* v. *Doherty*, 867 F.2d 47 (1st Cir.), cert. denied, 492 U.S. 918 (1989). There, the court held that a conspiracy to obtain a fraudulent civil service promotion was not extended by the conspirator's receipt of a higher salary over time, even though the salary increase was an objective of the conspiracy. The court reasoned that "where receiving the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions, such as receiving salary payments, *and* there is no evidence that any concerted activity posing the special dangers of con-

2. Petitioner also contends that the Sentencing Guidelines should not be applied to him because he had no further dealings with Barsanti or Kline after he left employment at the Carlton in 1985. Pet. 32-36.

The courts of appeals have consistently held that when a conspiracy continues after the effective date of the Sentencing Guidelines, the Guidelines apply to a co-conspirator unless he or she affirmatively withdrew from the conspiracy prior to November 1, 1987, even if the particular conspirator personally committed no acts in furtherance of the conspiracy after that date. See, *e.g.*, *United States* v. *Bafia*, 949 F.2d 1465, 1477 (7th Cir. 1991), *United States* v. *Arboleda*, 929 F.2d 858, 870-871 (1st Cir. 1991); *United States* v. *Williams*, 897 F.2d 1034, 1040 (10th Cir. 1990), cert. denied, 111 S. Ct. 2064 (1991). Mere cessation of activity in the conspiracy does not constitute withdrawal. See, *e.g.*, *Hyde* v. *United States*, 225 U.S. 347, 368-370 (1912); *Bafia*, 949 F.2d at 1477; *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991). Rather, to withdraw from a conspiracy, a defendant must take affirmative acts inconsistent with the its object and do so in a manner reasonably calculated to reach other conspirators. See, *e.g.*, *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 464-465 (1978); *United States* v. *LeQuire*, 943 F.2d 1554 (11th Cir. 1991); *United States* v. *MMR Corp.*, 907 F.2d 489, 500 (5th Cir. 1990), cert. denied, 111 S. Ct. 1388 (1991); see also *Bafia*, 949 F. 2d at 1477

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spiracy is still taking place, we do not see how one can reasonably say that the conspiracy still continues." 867 F.2d at 61. As the court of appeals held in this case, Pet. App. A16-A17, *Doherty* has no application here because Barsanti and Kline continued to act in concert, through BK Associates, to achieve the profitmaking objectives of the conspiracy after November 1, 1987.

("Withdrawal requires an affirmative act to either defeat or disavow the purposes of the conspiracy, such as making a full confession to the authorities or communicating to co-conspirators that one has abandoned the enterprise.").

The court of appeals properly held that petitioner remained a member of the conspiracy after November 1, 1987, because he had offered no evidence establishing his withdrawal. Pet. App. A19. Citing *United States* v. *Nerlinger*, 862 F.2d 967 (2d Cir. 1988), petitioner relies entirely on the proposition that leaving his job at the Carlton and ceasing to deal with Barsanti and Kline in 1985 constituted withdrawal from the conspiracy. Pet. 33-35. Petitioner's reliance on *Nerlinger*, however, is unavailing. In that case, the defendant, a salesman at the First Community Corporation of Boston, Inc. (FCCB), was involved in a complex mail fraud conspiracy through which FCCB's head trader, Tony DeAngelis, would divert profitable trades to an account that Nerlinger maintained in his fiancee's name. Nerlinger left his position at FCCB for reasons unrelated to the conspiracy. Before leaving, he asked DeAngelis if he could keep his account open after he left. DeAngelis said that Nerlinger could maintain the account, but Nerlinger later closed it, disabling himself from further participation in the diversion scheme. 862 F.2d at 970. The court of appeals held that Nerlinger had withdrawn from the conspiracy because "the closing of the account in the face of DeAngelis's invitation to continue it is an explicit withdrawal from the conspiracy." *Id.* at 975.

Here, by contrast, petitioner left the Carlton because the sales office closed. Pet. 34. There was no evidence that he did anything to defeat the continued success of the conspiracy, whose objectives extended beyond the mere acquisition of the units and contemplated the future profits of Barsanti and Kline.

Where, as here, a conspirator departs from the position through which he or she actively participated in the conspiracy for reasons that do not indicate a renunciation of the conspiracy, the departure does not constitute withdrawal. See, *e.g.*, *Lash*, 937 F.2d at 1083-1084 (no withdrawal where employee left because employer's local office closed); *United States* v. *Masters*, 924 F.2d 1362, 1368 (7th Cir.) (no withdrawal where police captain lost his job), cert. denied, 111 S. Ct. 2019 (1991).[11] Accordingly, petitioner was properly sentenced under the Guidelines because he remained a party to a conspiracy that continued after November 1, 1987.

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[11] In *United States* v. *Steele*, 685 F.2d 793, 803-804 (3d Cir.), cert. denied, 459 U.S. 908 (1982), the court of appeals held that the resignation of a high-level General Electric employee effected his withdrawal from a conspiracy to secure certain government contracts through bribery. The court concluded that the defendant had made a prima facie showing of withdrawal from the conspiracy because he "resigned and permanently severed his relationship with GE." 685 F.2d at 804. *Steele* is not inconsistent with the decision below. Because petitioner left his position at the Carlton in connection with the closing of its sales office, Pet. 34, his departure cannot readily be equated with a renunciation of the conspiracy in which he participated through that position. In any case, the defendant in *Steele* was engaged in a conspiracy whose primary objective was to enrich the company from which he later permanently resigned. Here, by contrast, the conspiracy's objectives primarily benefited Barsanti and Kline, rather than petitioner's employer. The termination of petitioner's employment does not indicate an abandonment of the conspiracy's purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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